**PP**

**v.**

**WONG WEI CHOON**

HIGH COURT MALAYA, MUAR
LAU BEE LAN J
[CRIMINAL TRIAL NO: 45-1-2006]
19 APRIL 2007

***CRIMINAL PROCEDURE:*** *Sentence - Juvenile offender - Penal Code, s. 304 - Adequacy - Mitigating factors - Whether there were extenuating circumstances - Public interest - Whether best served if offender given custodial sentence*

The offender herein pleaded guilty to the alternative charge under s. 304(a) under the second limb of the Penal Code and understood the nature and consequences of his plea. The court found him guilty and convicted him accordingly. The offender tendered a written plea in mitigation together with cited authorities. The deputy public prosecutor took objection to certain paragraphs in the written plea in mitigation. The counsel for the offender also urged the court in the exercise of its discretion to send the offender to Henry Gurney School pursuant to s. 76 of the Child Act 2001 ('the Act'). On the other hand, the deputy public prosecutor vigorously opposed any show of leniency and submitted basically on the premise that public interest demanded for a deterrent sentence as the offence committed by the offender was a serious offence.

**Held:**

(1) The deputy public prosecutor's objection ought to be sustained because the accused had admitted to the facts of the case without qualification and the paragraphs objected to have not been subjected to any cross-examination and there was no means by which the court could verify as to the truth of any provocation on the part of the deceased or that a person called Ah Fook suddenly appeared and assaulted the deceased. Therefore, save for the fact that there was a 'pertengkaran mulut' between the accused and the deceased, it could not be assumed that by virtue of the undisputed fact that there was an argument, by implication the deceased

challenged the accused by using offending language against him and his family and threatened to call a person named Han Jik and his friends and by extension there was provocation. (para 5)

**(2)** There were no extenuating circumstances under which the offence was committed. On the contrary, notwithstanding the absence of any dangerous weapon being used, the manner the offender reacted to the deceased upon being dissatisfied with the denial of the latter regarding the former's allegation that the latter had stolen his wallet which the former had handed over to the latter for safekeeping was indeed disproportionate in the circumstances. This was borne out by the facts that the offender had assaulted the deceased with his hand several times on his head, nose and body, more particularly after each assault which caused the deceased to fall to the cement floor of the basketball court, upon which the deceased had picked himself up, and the same process went on thrice until the fourth occasion when the deceased could no longer lift himself up and thereafter succumbed to the injuries sustained. The deceased, a child of the tender age of fifteen, did not throughout the unfortunate episode retaliated whilst the offender had to be restrained by a friend. (para 10)

**(3)** The gravity of the offence to which the offender had pleaded guilty to is reflected by the intention of legislature in amending the punishment provided under the law for the offence of s. 304 (a) (second limb) of the Penal Code with imprisonment which may extend to thirty years instead of twenty years *vide* Penal Code Amendment Act which came into effect from 6 March 2007 and shall also be liable to a fine. Weighing all the factors together, public interest would be best served if the accused/offender was given a custodial sentence and in this regard the offender was sentenced to six years imprisonment and the sentence was to run from the date of arrest. (para 12)

*[Order accordingly.]*

**Case(s) referred to:**
*Koay Teng Soon & Anor v. PP [2000] 1 CLJ 677 CA* ***(refd)***
*Lim Yoon Fah v. PP [1971] 1 MLJ 37* ***(refd)***
*Nordin Yusmadi Yusoff v. PP [1997] 4 CLJ 25 CA* ***(refd)***
*PP v. Francis Kuin [2006] 6 CLJ 103 HC* ***(dist)***

*PP v. Loo Choon Fatt [1976] 2 MLJ 256* ***(refd)***
*PP v. Low Kian Boon & Ors [2006] 3 CLJ 649 HC* ***(refd)***
*PP v. Nazarudin Ahmad & Ors [1993] 2 CLJ 543 HC* ***(refd)***
*PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC* ***(refd)***
*R v. Ball [1951] 35 Criminal Appeal Report 164* ***(refd)***
*Tan Bok Yeng v. PP [1972] 1 MLJ 214* ***(refd)***
*Teh Yew Whatt v. PP [1958] 24 MLJ 171* ***(refd)***
*Teo Siew Peng & Ors v. PP [1985] 2 MLJ 125* ***(refd)***
*Veerian T Latchmanen v. PP [2001] 7 CLJ 466 HC* ***(refd)***
*Yap Pak Yong v. PP [1959] 25 MLJ 176* ***(refd)***

**Legislation referred to:**
Child Act 2001, ss. 2(1), 76
Penal Code, ss. 34, 302, 304(a)

*For the accused - Kalaichelvan Kannan; M/s Vijaya Gopal & Assoc*
*For the prosecution - Haslinda Abu Bakar DPP*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Lau Bee Lan J:**

**[1]** The offender, Wong Wei Choon, was originally charged together with another person still at large in furtherance of the common intention of both of them to commit murder under s. 302 of the Penal Code read with s. 34 of the same (exh. P2) when he first appeared in this court on 20 February 2006. Subsequently, the prosecution preferred an alternative charge under s. 304(a) 2nd limb of the Penal Code (exh. P3) on 10 April 2007 as follows:

> Bahawa kamu pada 16.5.2004 antara jam lebih kurang 10.00 malam hingga 11.30 malam di Gelanggang Bola Keranjang, Taman Perumahan Layang-Layang, dalam daerah Kluang, di dalam Negeri Johor Darul Takzim, telah menyebabkan kematian LEONG TEIK LEE (K/P No: 890307-07-5523)" dengan niat menyebabkan kecederaan-kecederaan yang menyebabkan kematian. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan.

**[2]** The accused is represented by his counsel Mr. Kalaichelvan. The accused pleaded guilty to the alternative charge and understood the nature and consequences of his plea. He admitted, *inter alia*, to the facts of the case (exh. P4), First Information Report, Layang-Layang Police Report No. 000409/04 (exh. P5), the arrest report, Kluang Report 004536/04 (exh. P6), sketch plan and key of the scene of incident, (exh. P7 and exh. P7K), the post-mortem report (exh. P8), 10 photographs of the scene of incident (exh. P9A-J) and 18 photographs of the deceased prior and after post-mortem (exh. P10A-R). The court thereafter found the accused guilty and convicted him accordingly. The matter was adjourned to 18 April 2007 for the tendering of the probation report duly tendered through the probation officer and marked as exh. P20 and which was admitted by the offender.

**[3]** It would be appropriate at this juncture to reproduce the salient facts of the case as follows:

> 1. Pada 16.5.2004 jam lebih kurang 10.00 malam, LEONG TEIK LEE (simati, berumur 15 tahun 2 bulan) dan beberapa orang rakan sedang berada di kawasan Gelanggang Bola Keranjang, di Taman Perumahan Layang-Layang, Kluang, Johor.
>
> 2. Pada masa itu, tertuduh telah datang ke tempat simati dan menuduh simati mencuri wang tertuduh kerana simati telah memegang dompet tertuduh semasa tertuduh terlibat dalam satu pergaduhan dengan satu kumpulan lain pada jam 8.30 malam, 16.5.2004, di tempat yang sama. Simati menafikan ada mengambil wang tertuduh.
>
> 3. Tertuduh tidak puas hati dengan jawapan simati. Berlaku pertengkaran mulut dan tertuduh telah memukul simati menggunakan tangan. Seterusnya tertuduh telah tumbuk simati banyak kali di kepala, hidung dan badan. Selepas ditumbuk dan dipukul, simati sebanyak 3 kali di atas lantai simen gelanggang bola keranjang itu. Setiap kali selepas jatuh akibat dipukul, simati akan bangun balik. Pada setiap kali simati bangun, tertuduh akan tumbuk simati pada bahagian kepala, muka dan badan sehingga simati jatuh. Pada kali keempat selepas dipukul, simati jatuh dan tidak bangun lagi. Simati jatuh terbaring dalam keadaan terlentang di atas lantai simen gelanggang bola keranjang itu. Simati tidak membalas pukulan dari tertuduh.

4. Seorang rakan simati telah menghampiri tertuduh dan menarik tangan tertuduh dari memukul simati. Tertuduh meronta-ronta manakala simati baring terlentang di dalam keadaan darah keluar dengan banyaknya dari mulut, telinga dan hidungnya. Seorang saksi melihat simati mengerang kesakitan dan tangan simati mengigil. Rakan simati telah mendapatkan bantuan untuk membawa simati ke Hospital Kluang. Selepas simati dihantar ke Hospital kluang, tertuduh kemudiannya diambil oleh bapa tertuduh.

5. Simati telah disahkan meninggal dunia pada 16.5.2004 semasa berada di Hospital Kluang.

6. Bedah siasat ke atas simati mengesahkan punca kematian adalah 'Head injuries due to blunt force trauma'. Punca kematian adalah disebabkan oleh objek tumpul dan keras. Selain daripada itu, terdapat beberapa kecederaan lain pada bahagian badan, peha dan kepala simati. Laporan bedah siasat bertarikh 17.5.2004 yang disediakan oleh Doktor Mohamad Azaini bin Ibrahim adalah berkaitan.

**[4]** On behalf of the offender, his counsel tendered a written plea in mitigation together with authorities. The learned DPP has taken objection to certain paragraphs in the written plea in mitigation, namely:

(1) Paragraph 6, part thereof commencing from "Di dalam pertengkaran tersebut Si-mati telah memaki Pesalah dan keluarga Pesalah dengan perkataan-perkataan lucah serta mencabar Pesalah dan juga mengugut untuk memanggil Han Jik dan kawan-kawannya.

(2) Paragraph 7, the whole.

(3) Paragraph 8, the whole.

**[5]** Upon review of the facts of the case *vis-a-vis* the paragraphs objected to above, I find that I am in agreement with the learned DPP that her objection ought to be sustained because the accused had admitted to the facts of the case without qualification and the paragraphs objected to above by the prosecution, in my view, have not been subjected to any cross-examination and there is no means by which the court can verify as to the truth of any provocation on the part of the deceased or that a person called Ah Fook suddenly appeared and assaulted the deceased. Therefore save for the fact that there was a "pertengkaran mulut" as per para 3 of the facts of case, I am not prepared as suggested by

learned counsel for the offender, to assume that by virtue of the undisputed fact that there was an argument, by implication the deceased challenged the offender by using offending language against him and his family and threatened to call a person named Han Jik and his friends and by extension there was provocation.

**[6]** Learned counsel for the offender has urged the court in the exercise of its discretion to send the offender to Henry Gurney School pursuant to s. 76 of the Child Act 2001 ("the Act") upon the following grounds and mitigating factors: plea of guilt, clean antecedent of the offender, feeling of regret and remorse on the part of the offender, co-operation with the police, duration of the offender being under remand from 16 May 2004 until to date (for about 2 years and 11 months), the age of the offender during the commission of the offence being approximately 17 years and 6 months and the circumstances in which the offence was committed, namely, the act was not planned and no dangerous weapon was used. To substantiate his submission, learned counsel cited various authorities namely – (1) *Teh Yew Whatt v. PP* [1958] 24 MLJ 171; (2) *Nordin Yusmadi Yusoff v. PP* [1997] 4 CLJ 25; (3) *Lim Yoon Fah v. PP* [1971] 1 MLJ 37; (4) *PP v. Francis Kuin* [2006] 6 CLJ 103.

**[7]** On the other hand the learned DPP vigorously opposed any show of leniency submitting basically on the premise that public interest demands for a deterrent sentence as the offence committed by the offender was a serious offence, the conduct of the offender was disproportionate to what the deceased did, no extenuating circumstances existed during the commission of the offence and the changing trend of conduct of offenders with regard to the commission of crimes wherein custodial sentence was imposed. In support thereof several cases were cited:

(1) *PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 (2) *Yap Pak Yong v. PP* [1959] 25 MLJ 176; (3) *PP v. Low Kian Boon & Ors* [2006] 6 MLJ 254; (4) *Veerian T Latchmanen v. PP* [2001] 7 CLJ 466; (5) *Tan Bok Yeng v. PP* [1972] 1 MLJ 214; (6) *Koay Teng Soon & Anor v. PP* [2000] 1 CLJ 677; (7) *PP v. Nazarudin bin Ahmad & 2 Ors.* [1993] 2 CLJ 543.

**[8]** In the oft-cited passage of Hilbery J in the case in *R v. Ball* [1951] 35 Criminal Appeal Report 164 consistently followed by our courts (see *PP v. Loo Choon Fatt* [1976] 2 MLJ 256; *Teo Siew Peng & Ors. v. PP* [1985] 2 MLJ 125; *PP v. Nazarudin bin Ahmad & 2 Ors. (supra)*, His Lordship stated:

> In deciding the appropriate sentence a court should always be guided by certain considerations. *The first and foremost is the public interest.* The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. *A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime* as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. *Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life.* The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. *Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.* (emphasis added).

**[9]** In the instant case it is not disputed the offender has pleaded guilty to the alternative charge and has therefore saved much of court's time and expenses; he was a child within the definition of "child" under s. 2(1) of the Act as he was a person under 18 years of age at the time of commission of the offence; a first offender; the offence was not planned and no dangerous weapon was used; the offender extended cooperation to the police; has been in remand since the date of arrest ie, 16 May 2004; the offender did not show much academic inclination having on his own volition declined to continue his education after Form 2 as his studies were unsatisfactory and instead worked as a contract worker with his uncle between 2001 and 2004 earning a daily income of about RM30 to RM40 out of which he gives RM100 to his mother to be kept as savings; he did not have much parental guidance (save for the company of his grandmother) presumably because his parents were busy with their jobs, his father works as a logger for the last 10 years which takes him away from the home as he stays at the workers' longhouse whilst

his mother works as an operator in a microchip factory in Singapore and only returns home during the weekends; and is remorseful over his past conduct and promises to reform himself.

**[10]** As against this backdrop, the court cannot ignore the particular circumstances under which the offence was committed. I agree with the learned DPP that there are no extenuating circumstances as what the learned defence counsel attempted to show for the reasons which I have alluded to earlier. On the contrary, notwithstanding the absence of any dangerous weapon being used, I find the manner the offender reacted to the deceased upon being dissatisfied with the denial of the latter regarding the former's allegation that the latter had stolen his wallet which the former had handed over to the latter for safekeeping was indeed disproportionate in the circumstances as submitted by the learned DPP. This is borne out by the facts that the offender had assaulted the deceased with his hand several times on his head, nose and body, more particularly, after each assault which caused the deceased to fall to the cement floor of the basketball court, upon which the deceased picked himself up, and the same process went on thrice until the 4th occasion when the deceased could no longer lift himself up and thereafter succumbed to the injuries sustained as per the post mortem report that "2. There were marks of injury seen on the head, body and limbs of the head. These injuries were consistent as being due to blunt trauma. (3). Internal examination showed a base of skull fracture and injuries to the brain. These injuries were fatal" and the cause of death being "Head injuries due to blunt force trauma". The deceased, a child of the tender age of 15 years did not throughout the unfortunate episode retaliated whilst the offender had to be restrained by a friend.

**[11]** I am conscious of the case of *Francis Kuin (supra)* which I had the occasion to decide and which was cited by the learned defence counsel to persuade the court to similarly send the offender to Henry Gurney School under s. 76 of the Act. However it is to be noted that the facts and circumstances of that case can be distinguished from the present case.

**[12]** The court is also mindful of the gravity of the offence to which the offender has pleaded guilty to is reflected by the intention of legislature in amending the punishment provided under the law for the offence of s. 304(a) (2nd limb) of the Penal Code

with imprisonment which may extend to thirty (30) years instead of twenty (20) years *vide* Penal Code Amendment Act A1210/03 which came into effect from 6 March 2007 and shall also be liable to a fine. Weighing all the factors together, I am of the view that public interest would be best served if the accused is given a custodial sentence and in this regard the offender is sentenced to (six) 6 years imprisonment and the sentence is to run from the date of arrest ie, 16 May 2004.